U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

TetherView, LLC,

Plaintiff,

v.

Laura B. Zuchowski, in her Official Capacity, Director of the Vermont Service Center, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security;

L. Francis Cissna, in his Official Capacity, Director, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security;

Kirstjen Nielsen, in her Official Capacity, Secretary, U.S. Department of Homeland Security;

U.S. Citizenship and Immigration Services;

U.S. Department of Homeland Security,

Defendants.

CIVIL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER THE ADMINISTRATIVE PROCEDURE ACT

Case No. 5:19-cv-19

No request for Jury Trial

INTRODUCTION

1. This civil action seeks declaratory and injunctive relief against Laura B. Zuchowski, Director of the Vermont Service Center, U.S. Citizenship and Immigration Services ("USCIS"), U.S. Department of Homeland Security ("DHS"); L. Francis Cissna, Director, USCIS; Kirstjen Nielsen, Secretary, DHS; USCIS; and DHS (collectively "the Government") under the Administrative and Procedure Act ("APA"), 5 U.S.C. § 701, *et. seq.*

2. The Government improperly denied a Form I-129, Petition for Nonimmigrant Worker, otherwise known as an H1-B visa petition, filed by Plaintiff, TETHERVIEW, LLC. ("TetherView"), on behalf of a prospective employee, Mr. Vladimir Shustov ("Mr. Shustov").

3. TetherView sought to lawfully and gainfully employ Mr. Shustov for a three-year period in the specialty position of Operations Research Analyst.

4. Founded in 2014, TetherView provides state-of-the-art Private Cloud services making clients more secure, mobile, efficient and profitable. It quickly moves businesses to the Cloud, offering a turnkey solution for IT needs. TetherView combines the best of breed datacenter, hardware, software with expert service and support staff. As of 2017, TetherView employed 15 people in its sole office located in Oceanport, New Jersey.

5. TetherView has sought to employ a talented and qualified Operations Research Analyst to keep up with the exponential adoption of its product.

6. Pursuant to the Immigration and Nationality Act ("INA"), a United States employer may sponsor a qualified foreign national to temporarily enter the United States to "perform services . . . in a specialty occupation." INA §§ 101(a)(15)(H)(i)(b), 214(c); 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(c).

7. USCIS administers the H1-B program in conjunction with the United States Department of Labor ("DOL") pursuant to a bifurcated regime created and refined by Congress. In its current form, USCIS has the following two-part adjudicative responsibilities: First, the USCIS "director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act." 8 C.F.R. § 214.2(h)(4)(i)(B)(2). Second, the USCIS "director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act." 8 C.F.R. § 214.2(h)(4)(i)(B)(2).

8. In its September 27, 2018 decision, USCIS denied TetherView's Form I-129 petition based on its erroneous conclusion that the position offered to Mr. Shustov, Operations Research Analyst, did not satisfy the necessary conditions to constitute a specialty occupation.

9. Because USCIS abused its discretion and reached an unlawful, arbitrary, and capricious decision denying TetherView's H1-B petition for Mr. Shustov, this Court should hold unlawful and set aside its decision and declare that Mr. Shustov meets the qualifications for an H1-B visa. See 5 U.S.C. § 706(2).

JURISDICTION

10. This case arises under INA § 101, 8 U.S.C. § 1101, *et. seq.*, and the APA, 5 U.S.C. § 701, *et. seq.* This Court has jurisdiction pursuant to 28 U.S.C. § 1331 as a civil action arising under the laws of the United States. This Court also has the authority to grant declaratory relief under 28 U.S.C. §§ 2201-02, and injunctive relief under 5 U.S.C. § 702, and 28 U.S.C. §§ 1361-62. The United States has waived sovereign immunity under 5 U.S.C. § 702.

11. Federal courts have jurisdiction to review an employer-sponsors' legal challenges to the denial of visa applications under the APA. *See, e.g., Next Generation Tech., Inc. v. Johnson*, 2017 U.S. Dist. LEXIS 165531 at *21 (S.D.N.Y. Sept. 29, 2017); *Just Bagels Mfg. v. Mayorkas*, No. 12 cv 1358 (MC), 900 F. Supp. 2d 363, 376 (S.D.N.Y. 2012); *Glara Fashion, Inc. v. Holder*, No. 11 cv 889 (PAE), 2012 U.S. Dist. LEXIS 13660, 2012 WL 352309 (S.D.N.Y. Feb. 3, 2012).

12. USCIS' decision to deny TetherView's visa petition is a final agency decision ripe for judicial review and TetherView need not have sought an appeal before USCIS' Administrative Appeals Office ("AAO") before invoking the jurisdiction of this Court. *See, e.g., EG Enters v. DHS*, 467 F. Supp. 2d 728, 732-33 (E.D. Mich. 2006) (recognizing USCIS' concession in a cross-motion that

exhaustion of H1-B appeal was not required prior to seeking judicial review); *RCM Technologies, Inc. v. U.S. Dep't of Homeland Sec.*, 614 F. Supp. 2d 39, 45 (D. D.C. 2009) ("[P]laintiffs need not pursue an AAO appeal before seeking judicial review of denied visa applications in federal court.").

VENUE

13. Venue is proper before this Court pursuant to 28 U.S.C. § 1391(e) because (1) this is a civil action in which the Defendants are either employees or officers of the United States, acting in their official capacity, or an agency of the United States; (2) a substantial part of the events or omissions giving rise to the claim occurred in the District of Vermont; and (3) there is no real property involved in this action.

PARTIES

Plaintiff

14. TetherView is a technology company that provides state of the art Private Cloud services making clients more secure, mobile, efficient and profitable. It quickly moves businesses to the Cloud, offering a turnkey solution for IT needs. TetherView combines the best of breed datacenter, hardware, software with expert service and support staff.

15. On September 27, 2018, USCIS' Vermont Service Center ("VSC") issued a decision denying the Form I-129 Petition TetherView filed on behalf of Mr. Shustov.

Defendants

16. Defendant Laura B. Zuchowski is the Director of the VSC. Among other responsibilities, the VSC adjudicates visa petitions on behalf of employers, such as the H1-B visa petition TetherView filed. Defendant Ms. Zuchowski is sued in her official capacity.

17. Defendant L. Francis Cissna is the Director of USCIS. As Director, Defendant Cissna directs the administration of USCIS which oversees the issuance of visas along with its responsibility to implement the INA and other immigration-related laws. Defendant Cissna is responsible for USCIS' policies, practices, and procedures, which includes the delegated personnel who adjudicated TetherView's H1-B visa petition. Defendant Cissna is sued in his official capacity.

18. Defendant Kirstjen Nielson is the Secretary of the DHS, the federal agency overseeing many component agencies, including USCIS. In her official capacity, Defendant Nielson is responsible for the administration and enforcement of the INA and immigration-related laws. Defendant Nielson is sued in her official capacity.

19. Defendant USCIS is a component agency of the DHS, and shares responsibility for the implementation of the INA and immigration-related laws of the United States. USCIS is specifically tasked with the adjudication of immigration benefits, which includes the adjudication of H1-B visa petitions.

20. Defendant DHS is a cabinet department of the United States federal government overseeing many immigration-based component parts, such as USCIS, Immigration and Customs Enforcement, and Customs and Border Protection.

LEGAL BACKGROUND

21. The INA allows U.S. employers to petition for H-1B nonimmigrant visas on behalf of alien beneficiaries. 8 U.S.C. § 1184(c)(1).

22. As codified in the INA, this visa enables beneficiaries to be admitted temporarily to the United States for up to a three-year term, in order to work in "specialty occupation[s]" that require both "theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(3).

23. Before a visa petition may be approved, an employer must obtain certification from the DOL that it has filed a labor condition application in the specific occupational specialty. 8 C.F.R. § 214.2(h)(4)(ii).

24. The employer must then file an H-1B visa petition with the USCIS on behalf of the alien worker, which shows that the proffered position satisfies the statutory and regulatory requirements as a "specialty occupation." 8 U.S.C. § 1184(c).

25. Administrative regulations rehash the statutory definition and provide a non-exhaustive list of fields as examples of specialty occupations. The regulations provide:

> Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

8 C.F.R. § 214.2(h)(4)(ii).

26. Pursuant to the regulations implementing the INA, a position must meet one of the following four criteria to qualify as a "specialty occupation" under the statute:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organization or, in the

> alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

27. In addition to the requirement that a position meets the definition of a specialty occupation, the regulations require the employer to establish that the prospective employee within the specialty occupation possesses one of the following four qualifications related to the specialty occupation: (1) hold a U.S. bachelor or higher degree required by the specialty occupation from an accredited college or university, (2) hold an equivalent foreign degree, (3) hold an equivalent state license, registration, or certification authorizing her to full practice the specialty occupation, or (4) hold an equivalent combination of education, specialized training, and work experience. 8 C.F.R. § 214.2(h)(4)(iii)(C).

FACTUAL BACKGROUND

28. On or about March 30, 2018, TetherView filed a Form I-129, Petition for a Nonimmigrant Worker, to classify Mr. Shustov, a citizen and national of Russia, as

a temporary worker in H1-B status for the specialty occupation of Operations Research Analyst. A complete copy of that Petition with all the evidence filed is attached as **Exhibit A.**

29. USCIS issued a receipt notice for TetherView's Form I-129 on April 16, 2018, signifying that it had received the petition on April 12, 2018. **Exhibit B.**

30. In 2016, Mr. Shustov earned a U.S. Bachelor of Science degree in Business from the New Jersey Institute of Technology located in Newark, New Jersey. In 2017, he earned a U.S. Master's of Science degree in Management, also from New Jersey Institute of Technology. **Exhibit A.**

31. TetherView sought to employ Mr. Shustov for a three-year term in the position of Operations Research Analyst, a specialty occupation. TetherView agreed to pay Mr. Shustov an annual salary of $65,000.00 for work completed at its office in New Jersey. **Exhibit A.**

32. In support of its petition, TetherView supplied an LCA (I-200-18079-601755) for the position of Operations Research Analyst classified within the specialty occupation certified by DOL for the requested validity period September 12, 2018 to September 11, 2021; evidence of the valid F-1 status held by Mr. Shustov, a company support letter detailing the job duties, requirements, terms of employment, and Mr. Shustov's qualifications; more descriptive information about

the company and its product; and copy of Mr. Shustov's diploma and official transcripts. **Exhibit A.**

33. The position of Operations Research Analyst offered to Mr. Shustov required a bachelor's degree with highly sophisticated knowledge related to management that could not be performed by an individual lacking such a bachelor's degree providing this knowledge. The company's support letter included a long list of specific sophisticated duties and the percentage of time spent on each duty that supported the claim that at a degree in management or a closely related field is required for the position offered to Mr. Shustov. **Exhibit A.**

34. On May 10, 2018, USCIS issued a Request for Evidence ("RFE"), alleging that TetherView failed to submit sufficient evidence to show the position offered to Mr. Shustov required the services of a person performing a specialty occupation. **Exhibit B.**

35. In the RFE, USCIS referred to the following language from the Occupational Outlook Handbook issued from United States Department of Labor, Bureau of Labor Statistics ("OOH") with regard to the training and educational requirements for Operations Research Analyst:

> Many entry-level positions are available for those with a bachelor's degree. However, some employers may prefer to hire applicants with a master's degree.

> Although some schools offer bachelor's and advanced degree programs in operations research, some analysts have degrees in other technical or quantitative fields, such as engineering, computer science, analytics, or mathematics.
>
> Because operations research is based on quantitative analysis, students need extensive coursework in mathematics. Courses include statistics, calculus, and linear algebra.
>
> Coursework in computer science is important because analysts rely on advanced statistical and database software to analyze and model data. Courses in other areas, such as engineering, economics, and political science, are useful because operations research is a multidisciplinary field with a wide variety of applications
>
> Continuing education is important for operations research analysts. Keeping up with advances in technology, software tools, and improved analytical methods is vital.[1]

USCIS relied on the language from the OOH to conclude that the position of Operations Research Analyst did not qualify as a specialty occupation because the OOH did not indicate that Operations Research Analyst positions require a minimum of a baccalaureate degree in a *specific* specialty, or its equivalent.

Exhibit B.

36. The RFE provided TetherView the opportunity to submit additional evidence showing that the job offered to Mr. Shustov as an Operations Research

[11] The full language can be found at https://www.bls.gov/ooh/math/operations-research-analysts.htm.

Analyst required the services of a person performing a specialty occupation. **Exhibit B.**

37. On August 4, 2018, TetherView timely responded to the RFE. In the response, TetherView included a detailed response letter, evidence of Mr. Shustov's degrees and transcripts, an expert opinion letter, and examples of the complex and highly sophisticated work that Mr. Shustov performed in F-1 OPT status as an Operations Research Analyst for TetherView. **Exhibit C.**

38. Dr. Herve Queneau, Ph.D., professor and chairperson of the Department of Business Management at the Murray Koppelman School of Business to Brooklyn College of the City University of New York (CUNY) submitted a 24-page expert opinion that the particular position offered to Mr. Shustov required a bachelor's degree in a specific specialty or its equivalent. **Exhibit C.**

39. Dr. Queneau, who spoke with Mr. Shustov's manager directly to learn about the position in great detail, stated the following:

> "…I find that the position of Operations Research Analyst at TetherView, LLC satisfies the criterion of a specialty occupation set forth by the USCIS. It is truly a business necessity for TetherView, LLC to hire an individual with at least a bachelor's degree in Management or a related field or equivalent given the complexity of the proffered position and its criticality for the business model and competitiveness of the company. The position is complex because it requires advanced theoretical and applied knowledge in business statistics, database concepts and management, data analytics and mining, research methods, knowledge management, technology management, principles of economics, principles of accounting, business

law, principles of management, organizational behavior, principles of marketing, principles of finance, management information systems, operations management, project management, strategic management, and business communications as well as necessitates sophisticated analytical, quantitative, critical thinking, problem solving and communication skills. Clearly an individual with less than a bachelor's degree in Management or a related field would lack the theoretical and applied knowledge to effectively perform the duties of the proposed position.

Exhibit C.

40. Dr. Queneau also concluded that Mr. Shustov was well qualified to perform the duties of the position or Operations Research Analyst at TetherView based on his academic credentials. **Exhibit C.**

41. TetherView submitted the following detailed statement of Mr. Shustov's job duties, including the percentage of time devoted to each, the educational requirements for each duty, and how Mr. Shustov's degree related to each duty:

- Review, analyze, and improve company's operational processes **(40% of his time)**
  - Areas of focus (client build, user acceptance testing, customer service, marketing automation, social media automation, partner enablement, CRM database clean-up and restructure, CRM Funnel Analytics)

Further Detail:

TetherView is an early stage technology company, growing and developing at a high pace. Before Mr. Shustov joined TetherView, the company did not have a dedicated resource that would specifically focus on establishing, documenting and overseeing internal processes. There were significant communication gaps between the sales and technology teams because no one could easily translate the

technical jargon. TetherView's technical team did not have a proper way of documenting their work and was missing simple work protocols.

TetherView has been using a marketing automation tool called Infusionsoft to manage its contact database, nurture leads and keep track of all sales activities. Before Mr. Shustov joined the team, no one owned daily operations of the platform and did not have the proper marketing skills to take the full advantage of all functionality that Infusionsoft had to offer. Today, Mr. Shustov manages our lead inputs, pipeline stages, email marketing campaigns and sales reports. Mr. Shustov can complete all of these job duties based on the knowledge that he has gained in marketing classes at the New Jersey Institute of Technology, located in Newark, New Jersey (NJIT). In addition, Mr. Shustov maintained and conducted weekly updates to the company's website (www.tetherview.com). This particular website runs on WordPress, the basics for which he learned in MRKT 330: Principles of Marketing. In addition, he selected and implemented a social media automation tool called "Buffer". Once a week, he filled up the queue with articles, news and blogs related to the cloud technology and cybersecurity. Buffer pushes daily posts to TetherView's LinkedIn, Twitter and Facebook pages.

All presentations, marketing and sales collateral starts with Mr. Shustov. He receives ideas and directions from either the CEO, Director of Operations, or Sales Director to put together specific content. Due to his unique mix of technology and business education; he can successfully create attractive material with the right amount of sales and technical language. He also creates bi-weekly presentation decks for partner training, occasionally presents and conducts trainings himself, and also edits all existing sales collateral for context and format. Additionally, Mr. Shustov creates user-guides and how-tos for various technology products that TetherView deploys (TetherView Sync, Duo Multifactor Authentication, TetherView Virtual Desktop, etc.). He also collaborates with an outside copy-writer, passing him ideas for weekly blogs that TetherView posts on their website.

Percentage of Time Devoted to Task: 40%

***Degree Required*:** Bachelor's Degree in Management or in a closely related field.

***Courses Related to Task*:**

Mr. Shustov took the following related courses to obtain his U.S. Bachelor's degree in Business and U.S. Master of Science degree in Management:

MRKT 330 Principles of Marketing: This course discusses a broad range of relevant marketing concepts and theories. The class is designed to challenge students to explore the business implications of marketing and to apply their understanding to real-world situations. Goals of this course are to introduce the role of marketing, explain the interaction of marketing with other business functions and society, study marketing mix development and issues, examine the decisions involved in creating and executing successful marketing strategies and to develop and enhance the set of critical professional skills, including analytical abilities, effective written presentation skills and team work.

STS 310 Technology and Human Values: This course discusses the interactions between science, technology and human values. Specifically, explores psychological, moral, and philosophical consequences of, and humanistic responses to, technological change. Readings, essays, fiction, and research articles treat such topics as the philosophical foundations of modern science, scientism, technicism; the impact of technology on images of man found in modern literature; and the moral implications of various kinds of recent technology.

MGMT 480 Managing Est and Emerging Technology: This course discusses an array of technologies affecting management functions to provide an appreciation and understanding of the importance of new technologies as critical success factors for modern organizations. An integrative approach is taken in analyzing how changes in technology affect individual, group, and organizational effectiveness.

MRKT 620 Global Marketing Management: This course provides an understanding of how global product, pricing, promotion and distribution strategies are influenced by international environmental factors (political, legal, economic, competitive, sociocultural, infrastructure, and technological). Topics discussed include market segmentation, global marketing ethics, standardization or adaptation of the strategic marketing mix, selection of foreign market entry strategies as well as international strategic alliances.

MGMT 635 Data Mining & Analytics for Managers: This course is designed to provide the student with an understanding of both the theoretical base of prominent data mining methodologies along with how data mining can be used in the business environment to enhance operational efficiency. Concepts covered include: Data management conceptual model building, statistical analysis and building mining models for a variety of business applications. These objectives are accomplished through the utilization of relevant textbooks, case studies, software demonstrations and hands on data analysis (class project).

MGMT 650 Knowledge Management: This course discusses the principles of the knowledge management process. At the end of the course, students have a

comprehensive framework for designing and implementing a successful knowledge management effort and be able to assist in the development of knowledge.

- Assist in planning and initiating technology and operational projects **(40% of his time)**
  - Ares of focus: (cloud solution infrastructure components upgrades: servers, storage, networking, virtualization, monitoring, security, antivirus, ad-hoc software); (joint partner solutions);

Further Detail:

Since Mr. Shustov started working with TetherView, he has implemented a centralized project management platform (Zoho Projects) that keeps track of and documents every technology project that takes place within the company, internal and customer facing. Every engineer is now required to add daily input on their work to the system. All of the company employees have access to Zoho, and therefore can see and understand the stage of each client build. Mr. Shustov owns this system and provides daily and weekly reports to our Director of Operations and CEO.

Another major improvement that Mr. Shustov was able to bring to TetherView was a company-wide management process called OKRs (Objectives and Key-Results). TetherView did not have a process for cultivating and managing company goals that could directly relate to each employee's individual contribution. OKRs is a process that he learned in school and in short, it is a popular leadership process for setting, communicating and monitoring goals and results in organizations. TetherView and Mr. Shustov now create goals together with the management team and uses Zoho Projects to track the progress. Each employee has a set of quarterly OKRs that align to TetherView's main OKRs, and every Monday the company holds an hour-long meeting to go over their work and share feedback.

Another process that Mr. Shustov instilled is a method of communicating for cloud maintenance and upgrades to all existing TetherView clients. Before each maintenance period, together with the Lead Engineer, Mr. Shustov creates a short email containing a message about the upcoming work and puts together a list of all affected clients. He then sets up an automatic email campaign in Infusionsoft with at least 4 notification messages (1 week before, 1 day before, 2 hours before, the day after).

Over the past month, together with our Director of Operations, Mr. Shustov has been working on putting together documentation required for SOC 2 Type 2 compliance audit. The compliance checklist includes 21 documents that need to

describe TetherView's internal operational processes, procedures and protocols. His job is to create 5 documents specifically describing the following processes:

- ❖ Policies and procedures that address all controls;
- ❖ Description of access control system and monitoring to identify intrusions;
- ❖ Incident response procedures;
- ❖ Description of software, hardware, and infrastructure updates; and
- ❖ Change management process to address deficiencies in controls.

Percentage of Time Devoted to Task: 40%

***Degree Required*:** Bachelor's Degree in Management or in a closely related field.

***Courses Related to Task*:**

Mr. Shustov took the following related courses to obtain his U.S. Bachelor's degree in Business and U.S. Master of Science degree in Management:

IT 120 Intro to Networking Technology: This course teaches the basics of networking in a modern operating system environment. Emphasis is placed on the application and management of networking technology. Topics to be covered include: the OSI model, network hardware and technologies, network protocols, wired and wireless networks, TCP/IP.

MIS 363 Project Management For Managers: This course teaches theories, tools, and techniques to successfully manage projects. Students learn how to put together a project charter, define project goals, and develop project teams, schedules, and budgets. The course illustrates the key aspects of project lifecycles (initiation, planning, execution, monitor and control, and closing). It also emphasizes aspects of team, performance, risk, and quality management. The course uses a hands-on software and case-study projects as well as a reference research-oriented approach to achieve student learning objectives.

MGMT 190 Industrial Organizations & Management: This course teaches Foundations of the business enterprise and ecosystem. Organizational structures, governance, financial systems, marketing, and government interactions. Economic, political, psychological, and social influences on business.

MIS 680 Managerial Science: This course teaches the methodology of decision making applying the techniques of operations research and system analysis to managerial problems. Introduction to the concept of objective functions and constraints, concepts of value and utilities, optimization algorithms, networks and game theories. Elementary mathematical model linear production systems, inventory systems, multi-criteria decision making, project management and transportation planning.

MIS 648 Decision Support Systems for Managers: This class discusses the use of decision support systems to support management decision making in a real-world environment. Topics include: establishing and measuring decision support systems success criteria, software tools, model management, elements of artificial intelligence, and statistics. Justification, design, and use of decision support systems.

MIS 645 Information Systems Principles: This course teaches the field of Information Systems; the study of how people and organizations should use information technologies effectively. The course examines the major areas in the field, analyzing the major issues, trends and problems. Surveys the role of information systems in organizations and how these systems support organizational objectives and organizational structure, as well as providing competitive business advantages. Discuss basic concepts such as the systems point of view, the organization of a system, the nature of information and information flows, as well as how people process information and related cognitive concepts. Examines various types of information system applications such as big data, cloud computing, ecommerce, supply chain, decision support, and enterprise systems.

- Serve as a liaison between business and technical aspects of projects (2.5% of his time);

Further Detail:

Mr. Shustov provides weekly updates on all existing client implementation projects. He is in charge of conducting daily 15-minute meetings with the engineering team to ensure that all progress gets properly documented and tracked in Zoho Projects. In addition, he goes over daily client support requests and notifies the sales team, if needed.

Percentage of Time Devoted to Task: 2.5%

***Degree Required*:** Bachelor's Degree in Management or in a closely related field.

***Courses Related to Task*:**

Mr. Shustov took the following related courses to obtain his U.S. Bachelor's degree in Business and U.S. Master of Science degree in Management:

CS 103 Computer Science-Business Problems: This course teaches a range of topics in information technology (IT). Students learn how to independently solve problems and be capable of fully applying the knowledge of IT. Specific topics covered include basic IT terminology, networking, HTML, algorithms, computer organization, Excel, and databases.

MGMT 593 Coop Work Experience IV: This course enables management students to apply their theoretical knowledge through real-world jobs and internships. Each student is allowed to find an internship, closely related to their studied. In order to receive school credit, students are required to submit a research paper, describing their work experience and learning outcomes. In the summer of 2017, Mr. Shustov worked as business intern at Symbolic IO, helping the upper management with project management, marketing and operations.

- Monitor progress to assure deadlines, standards, and cost targets are met (2.5% of his time);

***Further Detail*:**

Mr. Shustov is responsible for ensuring that all deadlines that are set by the management team can be met. Using Zoho Projects, he monitors daily and weekly progresses and reports to the management team if there is a possibility of a project going off track.

***Percentage of Time Devoted to Task*:** 2.5%

Degree Required: Bachelor's Degree in Management or in a closely related field.

Courses Related to Task:

Mr. Shustov took the following related course to obtain his Bachelor's degree in Business:

MIS 245 Intro To Management Information Systems: This course covers Concepts of information systems, business process, hardware, software, systems analysis, e-commerce, enterprise systems and computer applications in organizations, techniques of systems analysis, systems designs, implementations,

and information management (both technical and behavioral) are studied in the organizational context of management information needs.

- Help design and monitor work breakdown structure (WBS) **(2.5% of his time)**;

Further Detail:

Together with TetherView's implementation engineer, Mr. Shustov created a cloud construction checklist. There are 3 stages to this process, "Project Planer"; "Implementation", and "Handoff". Each of these task lists contains multiple tasks and subtasks that our engineers follow during all cloud implementations for our clients. Once a month they go through the checklist to ensure that all tasks are up to date with current TetherView offerings and processes.

Percentage of Time Devoted to Task: 2.5%

***Degree Required*:** Bachelor's Degree in Management or in a closely related field.

***Courses Related to Task*:**

Mr. Shustov took the following related course to obtain his Bachelor's degree in Business:

MIS 363 Project Management For Managers: This course teaches theories, tools, and techniques to successfully manage projects. Students learn how to put together a project charter, define project goals, and develop project teams, schedules, and budgets. The course illustrates the key aspects of project lifecycles (initiation, planning, execution, monitor and control, and closing). It also emphasizes aspects of team, performance, risk, and quality management. The course uses a hands-on software and case-study projects as well as a reference research-oriented approach to achieve student learning objectives.

- Provide support in negotiating with project stakeholders or suppliers to obtain resources or materials **(5% of his time)**;

Further Detail:

Mr. Shustov was responsible for getting proper licensing to our internal file monitoring utility Netwrix. The project involved getting a hold of Netwirx sales reps, providing them with specific compliance needs and submitting paperwork for special pricing. Mr. Shustov had found that TetherView was paying 80% more than

it should have, because in the past, our engineers did not submit any paperwork that could prove that TetherView uses Netwrix software as a service provider, and therefore qualifies for special Managed Service Provider discount of 80%.

Today, Mr. Shustov is responsible for qualifying TetherView into Microsoft's Cloud Service Partner Program and Qualified Multitenant Hoster Program. This program will provide TetherView with the eligibility to host Windows 10 Operating Systems in our environment, therefore providing our clients with a superior performance and better user face. In order to successfully provide this service, one must be familiar with each of the following:

- Active Direct (1-Tier) CSP Partner
- Must have an active Services Provider License Agreement (SPLA) with Microsoft
- Must pay a monthly program administrative fee (the fee will remain the same as the SCA Program administrative fee)
- Create a page on your domain that provides an overview of the program and your specific service offering for your customers (Microsoft will provide you with guidelines for the content of this page)
- Execute a SPLA Amendment for the Qualified Multitenant Hoster Program
- Provide Microsoft with a monthly report of customer organization IDs, tenant IDs, and the number of end users per tenant

Percentage of Time Devoted to Task: 5%

***Degree Required*:** Bachelor's Degree in Management or in a closely related field.

***Courses Related to Task*:**

Mr. Shustov took the following related courses to obtain his Bachelor's degree in Business:

MGMT 290 Business Law I: This course covers the principles of common and statutory law applicable to business and professional relationships, emphasizing contracts, negotiable instruments, sales of goods, agency and business organizations.

MGMT 310 Coop Work Experience: This course enables management students to apply their theoretical knowledge through real-world jobs and internships. Each

student is allowed to find an internship, closely related to their studied. In order to receive school credit, students are required to submit a research paper, describing their work experience and learning outcomes. In the summer of 2016, Mr. Shustov worked as a Foreign Workers Ambassador, assisting a group of 50+ international workers at a resort housekeeping company, MasterCorp. Mr. Shustov was able to improve his communication, leadership and managerial skills throughout daily coordination and support of multiple housekeeping groups at five different resorts in South Carolina.

- Help supervisors to identify, review, or select vendors or consultants to meet project needs (3% of his time);

Further Detail:

So far, Mr. Shustov has provided support to the management team in terms of technology research and pricing comparison for the following products and vendors:

- Data Backup Technology (Solarwinds vs Autotask)
- NOC and Help Desk Services (Kaseya, Continuum, GMS Live, InBay, LVHD, Pulseway)
- Storage vendors (NetApp, Nutanix, Infinidat)
- Server vendors (Penguin Computing, Formulus Black, Cisco)
- Antivirus products (McAfee, Bitdefender)
- IT Documentation (IT Glue)
- Project Management (Zoho Projects)
- Auditing/Monitoring software (Netwrix)

Percentage of Time Devoted to Task: 3%

***Degree Required*:** Bachelor's degree in Management or in a closely related field.

***Courses Related to Task*:**

Mr. Shustov took the following related course to obtain his Master's degree in Management:

HRM 601 Organizational Behavior: This course covers the analysis of key organizational components; individual perception; learning ability; conflict resolution models; group processes in decision making; motivation; problem

diagnosis, and the organization as the mechanism for joining into a coherent productive system. Organizational assessment for innovation, leadership styles, and environmental interaction.

- Coordinate recruitment or selection of project personnel **(2% of his time)**;

Further Detail:

Mr. Shustov analyzes all of our future projects and current workloads of engineers. This analysis helps him match engineers with various projects in a most efficient way. Together with the Director of Operations and sometimes the CEO, they review his analysis and put a final stamp of approval on projects.

Percentage of Time Devoted to Task: 2%

***Degree Required*:** Bachelor's Degree in Management or in a closely related field.

***Courses Related to Task*:**

Mr. Shustov took the following related course to obtain his Bachelor's degree in Business:

HRM 301 Organization Behavior: This course covers individual and group behavior in organizations. Processes such as perception, motivation and leadership are examined with a focus on issues central to technology-based organizations (innovation, creativity, managing technical professionals).

- Prepare project status reports for upper level managers by collecting, analyzing, and summarizing information and trends **(5% of his time)**

Further Detail:

Officially, Mr. Shustov is responsible for putting together the following reports:

- Weekly Demo usage report
- User Acceptance Testing (UAT) usage report
- Quarterly Cybersecurity and Threat report
- Weekly infrastructure check report
- Weekly support and tickets report

➢ Monthly sales report to the CEO

Percentage of Time Devoted to Task: 5%

***Degree Required*:** Bachelor's Degree in Management or in a closely related field.

***Courses Related to Task*:**

Mr. Shustov took the following related course to obtain his Bachelor's degree in Business:

MGMT 316 Business Research Methods: This course covers business research methodologies with an emphasis on data collection/mining and data analysis. It offers the knowledge skills to conduct research in all applicable fields from the traditional areas of business, such as, marketing, finance, human resources, operations and service management, as well as web-based e-commerce related research applications. Upon completion, students are able to: (1) understand business research methodologies, (2) conduct business research studies, (3) present the results, analyses and recommendations to management.

ENG 352 Technical Writing: This course combines current theory with actual practice to prepare students as technical writers. Analyze complex communication situations and design appropriate responses through tasks that involve problem solving, rhetorical theory, document design, oral presentations, writing teams, audience awareness, ethical considerations, and gender equity issues.

- Submit project deliverables, ensuring adherence to quality standards **(2.5% of his time)**.

Further Detail:

Most of TetherView project deliverables are technology services. TetherView builds and manages private clouds, through a method of software virtualization which allows TetherView to host all of our clients' IT infrastructure inside of our data centers. We provide our clients with a User Acceptance Checklist, which includes the list of all products and services that we put together. Specifically, Mr. Shustov is responsible for ensuring that each of our clients receives this custom checklist.

Percentage of Time Devoted to Task: 2.5%

> ***Degree Required***: Bachelor's Degree in Management or in a closely related field.
>
> ***Courses Related to Task***:
>
> Mr. Shustov took the following related course to obtain his Bachelor's degree in Business:
>
> **MGMT 492 Business Policy – Honors**: This course covers the integration of concepts taught in various functional courses such as marketing, finance, operations management, accounting, organizational behavior. Issues related to corporate responsibilities and ethical behavior are also incorporated in this course. Emphasis on application of concepts to real life situation is achieved through case discussion and projects.

Exhibit C.

42. On September 27, 2018, USCIS issued a decision denying TetherView's petition on the basis that the record evidence failed to establish that the position of Operations Research Analyst qualified as a specialty occupation. **Exhibit D.**

43. USCIS once again referred to a lack of an indication within the OOH "that a baccalaureate degree in a specific field of study is the minimum educational requirement for Operations Research Analysts," and thus rejected TetherView's position that a baccalaureate or higher degree, or its equivalent, in a specific specialty, is normally the minimum requirement for entry into the particular position. **Exhibit D.**

44. USCIS further found that TetherView did not provide "evidence to establish that the degree requirement in a specific specialty is common to the industry in

parallel positions among similar organizations," and thus failed to satisfy the first part of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). **Exhibit D.**

45. Turning once again to the OOH, USCIS quoted the following language:

> Although the typical educational requirement for entry-level positions is a bachelor's degree, some employers may prefer to hire applicants with a master's degree. Because few schools offer bachelor's and advanced degree programs in operations research, analysts typically have degrees in other related fields.

USCIS interpreted the language as follows: "The *OOH* does not indicate that a baccalaureate degree in a specific field of study is the minimum educational requirement for Operations Research Analysts." Based on this interpretation, and without addressing the other evidence of record, USCIS concluded a degree in a specific specialty or its equivalent was not required for Operations Research Analysts, and thus the evidence did not meet the first regulatory criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). **Exhibit D.**

46. Moreover, USCIS determined that TetherView's evidence failed to satisfy the second part of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), showing that the particular position was so complex or unique that it could only be performed by an individual with a degree in a specific specialty. **Exhibit D.**

47. Although USCIS considered TetherView's expert opinion at this stage in its decision, USCIS found that the expert had not specifically addressed other forms of evidence such as the OOH, which indicated that degrees from other fields are regularly accepted. Therefore, USCIS rejected the expert opinion for having failed to "sufficiently evaluate" the proffered position or the greater industry. **Exhibit D.**

48. Turning to the third criterion to qualify as a specialty occupation, 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), USCIS found that TetherView "did not provide evidence to demonstrate that" the company "normally requires" Operations Research Analysts to possess a "degree or its equivalent," notwithstanding TetherView's signed statement to the contrary. Nevertheless, USCIS concluded that TetherView's "opinion alone cannot establish the position as a specialty occupation" and declined to accept TetherView's "self-imposed requirements" of a degree. **Exhibit D.**

49. Finally, USCIS concluded that TetherView's "detailed position description and examples of the beneficiary's work" failed to satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), as showing that the nature of Mr. Shustov's specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. **Exhibit D.** USCIS recognized that "the submitted

position appears to be complex in nature," but found that "the duties themselves appear to cross a wide variety of fields including: computer science, management, finance, and statistics." Although USCIS recognized that "these duties may require a bachelor's degree," it found that TetherView failed to prove that "such a degree would need to be in a specific field of study." **Exhibit D.**

STATEMENT OF CLAIMS

Count One:
Violation of the Administrative Procedure Act, 5 U.S.C. § 701, et. seq.

50. TetherView re-alleges and incorporates by reference herein all of the allegations set forth above.

51. The APA empowers this Court to set aside a final agency action where, as here, the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

52. "While judicial review of agency decisions is highly deferential, it is not without teeth." *Raj & Co. v. U.S Citizenship & Immigration Servs.*, 85 F. Supp. 3d 1241, 1248 (W.D. Wash. 2015). An arbitrary and capricious determination results where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product

of agency expertise." *NRDC v. United States EPA*, 658 F.3d 200, 215 (2d Cir. 2011), *quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856 (1983).

53. USCIS' decision must reflect that it "considered the pertinent evidence, examined the relevant factors, and articulated a satisfactory explanation for its action." *Noroozi v. Napolitano*, No. 14 cv 2012 (PAE), 905 F. Supp. 2d 535, 541 (S.D.N.Y. 2012), *citing J. Andrew Lange, Inc. v. FAA*, 208 F.3d 389, 391 (2d Cir. 2000).

54. USCIS' September 27, 2018, decision does not meet these standards, and thus is unlawful and should be set aside. *Id.*

55. USCIS (1) arbitrarily disregarded and misapprehended TetherView's evidence; (2) entirely failed to discuss or otherwise demonstrate that it considered all the material evidence; and (3) offered an implausible, cursory explanation for denying TetherView's petition that runs counter to the unquestioned, credible and irrefutable evidence of record.

56. In response to USCIS' RFE, TetherView provided detailed evidence of the requisite baccalaureate degree, or its equivalent, required for the position of Operations Research Analyst and the specific, complex duties Mr. Shustov performed, which required highly specialized knowledge associated with someone

who possessed at least a baccalaureate degree in a specific specialty or its equivalent. **Exhibit C.**

57. USCIS' decision does not reflect that it evaluated the material evidence relating to the specialty occupation, including the expert opinion TetherView offered. **Exhibit D.**

58. USCIS arbitrarily rejected and misapprehended the 24-page expert opinion letter from Dr. Herve Queneau, Ph.D., who considered the particular Operations Research Analyst position TetherView offered to Mr. Shustov and spoke with TetherView management. **Exhibit C.**

59. USCIS acknowledged in its decision that, "…the submitted position appears to be complex in nature…," but despite the evidence in the record irrationally concluded that the duties themselves did not establish the existence of a specialty occupation because they "appear to cross a wide variety of fields including computer science, management, finance, and statistics." **Exhibit D.**

60. Without citing any authority or evidence to doubt the credibility of the evidence and after offering TetherView the opportunity to produce evidence, USCIS further stated that while TetherView claimed that the offered position requires a degree, "your [or your expert's] opinion alone cannot establish the position as a specialty occupation." **Exhibit D.**

61. Notwithstanding, USCIS recognized that the expert's opinion evaluated the job duties and concluded that the position requires a degree closely related to Management, USCIS arbitrarily dismissed the opinion because it did "…not address the other forms of evidence you submitted such as the OOH which indicates that degrees from other fields are regularly accepted." **Exhibit D.**

62. USCIS implausibly and irrationally concluded that the expert bore a responsibility to separately address the OOH's value or language used, in addition or in lieu of the specifics of the job duties and educational requirements for this particular position. USCIS irrationally discounted the expert letter opinion without value simply because it does not address what it sees as inconsistencies in the OOH. In doing so, USCIS arbitrarily issued a decision that runs counter to the evidence of record. **Exhibit D.**

63. In addition to the expert opinion, TetherView's response letter set forth very specific job duties and academic courses that Mr. Shustov successfully completed to earn his U.S. Master of Science degree in Management and U.S. Bachelor's degree in Business. **Exhibit C.**

64. Despite requesting such detail, USCIS irrationally dismissed and discredited the specific information TetherView provided, which, when rationally considered, demonstrated that the position offered was so complex and unique that it could

only be performed by an individual with a bachelor's degree, and thus qualified as a specialty occupation. **Exhibit D.**

65. Therefore, USCIS arbitrarily and irrationally denied TetherView's H1-B petition, and this Court should set aside its decision. **Exhibit D.**

Count 2:
Violation of the Administrative Procedure Act, 5 U.S.C. § 701, et. seq.

66. TetherView re-alleges and incorporates by reference herein all of the allegations set forth above.

67. USCIS arbitrarily relied on language found in the OOH to reach a decision that runs counter to the specific evidence presented. **Exhibit D.**

68. USCIS based its conclusion that the position offered to Mr. Shustov did not qualify as a specialty occupation on an incomplete evaluation of the OOH's own language. In denying the H-1B petition, USCIS cites the following language taken from OOH in regards to Operations Research Analysts:

> "Although the typical educational requirement for entry-level positions is a bachelor's degree, some employers may prefer to hire applicants with a master's degree. Because few schools offer bachelor's and advanced degree programs in operations research, analysts typically have degrees in other related fields."

Exhibit D.

69. From this language, USCIS arbitrarily concluded that "the OOH does not indicate that a baccalaureate degree in a specific field of study is the minimum educational requirement for Operations Research Analysts. Therefore, it found that the evidence failed to satisfy the second part of the criterion at 8 CFR 214.2(h)(4)(iii)(A)(2): that the employer's particular position is so complex or unique that it can only be performed by an individual with a degree in a specific specialty." **Exhibit D.**

70. By concluding that the OOH did not indicate that Operations Research Analysts positions require a baccalaureate degree in a *specific* specialty, or its equivalent," USCIS misapprehended the OOH. **Exhibit D.**

71. The OOH plainly refers to the specific specialty degree required and equivalent degrees required for Operations Analyst positions stating that, "[b]ecause few schools offer bachelor's and advanced degree programs in operations research, analysts typically have degrees *in other related fields*."

72. USCIS' irrationally failed to consider the complete language of the OOH, which provides:

HOW TO BECOME AN OPERATIONS RESEARCH ANALYST

Education

> Many entry-level positions are available for those with a bachelor's degree. However, some employers may prefer to hire applicants with a master's degree.
>
> Although some schools offer bachelor's and advanced degree programs in operations research, some analysts have degrees in other technical or quantitative fields, such as engineering, computer science, analytics, or mathematics.
>
> Because operations research is based on quantitative analysis, students need extensive coursework in mathematics. Courses include statistics, calculus, and linear algebra. Coursework in computer science is important because analysts rely on advanced statistical and database software to analyze and model data. Courses in other areas, such as engineering, economics, and political science, are useful because operations research is a multidisciplinary field with a wide variety of applications.

Exhibit E.

73. Rather than undermining TetherView's evidence, the OOH corroborated its argument that the position of Operations Research Analyst offered to Mr. Shustov satisfied the specialty occupation requirement because the typical educational requirement is a bachelor's degree, if not often a master's degree, in a specialty field related to operations research with a quantitative focus or its equivalent.

74. Therefore, USCIS irrationally interpreted and relied upon the language within the OOH to reach a decision that runs counter to the record evidence.

Count 3:
Violation of the Administrative Procedure Act, 5 U.S.C. § 701, et. seq.

75. TetherView re-alleges and incorporates by reference herein all of the allegations set forth above.

76. Notwithstanding that a correct reading of the OOH supports approval of TetherView's petition, USCIS abused its decision by looking to the OOH as an exclusive, mandatory source of knowledge of what constitutes a specialty occupation for purposes of the INA. In fact, just the opposite is true.

77. The Department of Labor's own Bureau of Labor Statistics, tasked with updating and putting out the OOH, publishes its own disclaimer plainly stating that the OOH should not be seen as an absolute authority or be used for any legal purpose:

> Although these references were carefully compiled, the Bureau of Labor Statistics (BLS) has neither the authority nor the facilities to investigate the organizations or the information or publications made available to BLS. **As a result, BLS cannot guarantee the accuracy of such information and the listing of an organization does not constitute in any way an endorsement or recommendation by BLS, either of the organization and its activities or of the information the organization may supply**…[The] *OOH* provides a general, composite description of jobs and cannot be expected to reflect work situations in specific establishments or localities. **The OOH, therefore, is not intended to, and should never, be used for any legal purpose . . . BLS has no role in establishing educational, licensing, or practicing standards for any occupation. . .** The education information in the **OOH** presents the typical requirements for entry into the given occupation and does not describe the education and training of those individuals already employed in the occupation. **In**

> **addition, education requirements for occupations may change over time and often vary by employer or state. Therefore, the information in the OOH should not be used to determine if an applicant is qualified to enter a specific job in an occupation."** [emphasis added].[2]

Despite this clear disclaimer, and clear acknowledgement by the BLS that the information contained in the OOH may be outdated or inaccurate, USCIS invoked the OOH as an authoritative source and conclusive of the outcome here. **Exhibit D.**

78. USCIS' reliance on the OOH as an authoritative source to deny TetherView's H1-B petition was arbitrary and contrary to law.

79. The plain language of the OOH is updated every two years and does not provide real-time updates. There is no rational reason for USCIS to solely rely upon the stale recitation of required levels or type of education for a given field, particularly those which involve technology that can evolve quickly, especially where, as here more updated, material evidence is proffered, such as the expert opinion.

80. In this case, TetherView submitted specific and detailed evidence showing that Mr. Shustov had attained the necessary highly specialized knowledge required

[2] This language is located at www.bls.gov/ooh/about/disclaimer.htm?view_full

to work in the specialty occupation of Operations Research Analyst, and thus met the statutory requirements for an H1-B visa. *See* 8 U.S.C. § 1184(i)(2); **Exhibit C.**

81. USCIS abused its discretion because it failed to consider pertinent evidence, examine the relevant factors, and articulate a coherent explanation for its action that comported with the legal and regulatory requirements. **Exhibit D.**

PRAYER FOR RELIEF

WHEREFORE, Plaintiff TetherView, LLC., respectfully requests the Court grant the following relief:

A. Assume jurisdiction over this matter;

B. Hold unlawful and set aside the USCIS' decision denying Plaintiff's H1-B petition on behalf of Mr. Shustov on the ground that the decision was arbitrary and capricious;

C. Enter an order requiring the USCIS to approve Plaintiff's H1-B petition and application for a change of status in favor of Mr. Shustov;

D. Award to Plaintiff attorneys' fees, costs, and interest as permitted by law; and

E. Grant such further and other relief as may be just and proper.

Respectfully submitted,

TetherView, LLC., by their attorneys,

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Dated: February 1, 2019

**Moving for Pro Hac Vice Admission*